NO. 95062-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO, an incapacitated person, individually, and BIANCA BELTRAN as guardian *ad litem* of the person and estate of CESAR BELTRAN-SERRANO

Plaintiffs/Appellants,

vs.

CITY OF TACOMA, a political subdivision of the State of Washington;

Defendant/Respondent.

BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES

PAGE(S)

WASHINGTON CASES

PAGE(S)

WASHINGTON CASES (continued)

PAGE(S)

FEDERAL CASES

NON-WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

PAGE(S)

STATUTES

COURT RULES

SECONDARY SOURCES

OTHER SOURCES

I. INTRODUCTION

The question posed by this case is not whether a police officer or her employer can be liable for the use of excessive force when encountering or arresting a potential suspect. Such liability most assuredly can exist under both federal and Washington state law.

Rather, the question posed is whether this Court should adopt a *new* state law cause of action—negligence—to govern an officer's intentional use of force to subdue an individual. Accepting the invitation of Appellant Carlos Beltran-Serrano would necessarily undermine decades of Washington precedent holding that under the common law, unaltered by any implied statutory duty, police officers do not owe actionable duties in negligence to police reasonably absent a special relationship. More specifically, as Respondent City of Tacoma has already noted, Washington has long rejected efforts to create an actionable duty of care by law enforcement to reasonably investigate allegations of criminal misconduct, with the lone exception being within the statutorily created duty in the context of child abuse allegations. If accepted by the Court, a duty to "reasonably" interact with suspects in an encounter that can span just seconds would inevitably require the Court to reconsider and overrule precedent rejecting a duty to act "reasonably" in an investigation that can last days, weeks, months, or even years. As a matter of "policy …,

precedent, logic, justice, and common sense," this Court should reject Beltran-Serrano's request to expand Washington tort law, particularly in the absence of any additional guidance or support from the legislature. *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 74, 375 P.3d 651 (2016). The Court should affirm.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington State Association of Municipal Attorneys (WSAMA) is a non-profit organization of municipal attorneys who represent Washington's 281 cities and towns. WSAMA members represent municipalities throughout the state. Its members advise and defend their respective client-cities in cases involving allegations of police liability. The scope of that liability is one of great importance to Washington's cities and towns, meaning WSAMA has a vested interest in the outcome of this case.

III. STATEMENT OF THE CASE

Factual disputes cannot give rise to the existence of an actionable duty of care, only to whether a duty was breached by the defendant. *Osborn v. Mason County*, 157 Wn.2d 18, 22-23, 134 P.3d 197 (2006). The antecedent question though—whether a specific duty exists in the first place—is a question of law reserved for the Court, not the jury. *Id.* Thus,

the majority of Beltran-Serrano's reliance on her experts and attacks on Officer Volk's credibility do not aid the analysis.

For purposes of the singular question of which this Court granted review, the only germane facts are as follows. Officer Michel Volk shot and injured Cesar Beltran-Serrano. Beltran-Serrano alleges that tactical errors—namely continuing to interact with Beltran-Serrano instead of waiting for an interpreter to arrive—led to Volk deploying deadly force, which he claims was unreasonable. The parties appear to dispute whether, in the moment deadly force was used, Beltran-Serrano swung a weapon at Officer Volk and whether Officer Volk reasonably feared for her safety when she shot Beltran-Serrano. But the facts leading up to the moment deadly force was used—and consequently the facts governing the proposed negligence cause of action—are undisputed.

IV. ARGUMENT

Beltran-Serrano's appeal furthers one primary argument: this Court should recognize a new tort for "negligently us[ing] deadly force." Br. of Appellants at 27. In so doing, Beltran-Serrano conflates concepts of duty and immunity and invariably asks this Court to blur the lines between statutorily created duties and the common law. This Court should reject Beltran-Serrano's invitation, adhere to Washington precedent, and affirm.

A. Washington imposes actionable duties of care on the police to act only when the legislature so directs or when a special relationship exists, neither of which applies here.

As Tacoma correctly articulates, the common thread permeating Beltran-Serrano's brief is the misconception that the absence of an actionable duty in negligence is synonymous with the existence of immunity. *E.g.*, Br. of Appellant at 17 (citing *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88 (1994) for the proposition that "municipalities are largely *immune* from tort claims by victims of unreasonable police practices") and 20 ("The trial court here seemingly concluded that the City was *immune* from a negligence action based on improper training…."). Not so. Contrary to what Beltran-Serrano argues, there is a marked difference between the two concepts. *Oberg v. Dep't of Nat. Res.*, 114 Wn.2d 278, 289, 787 P.2d 918 (1990) ("the public duty doctrine … negates the *existence* of a duty to a particular plaintiff, [whereas] sovereign immunity … admits the existence of a duty and a tort for its breach, but denies liability because of immunity"). Although the end result is the same—the denial of recovery—the concepts are distinct and rationally so. The plaintiff bears the burden to prove all four elements of a negligence cause of action: (1) existence of a duty, (2) breach thereof, (3) proximate causation, and (4) damages. *Wuthrich v. King County*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016) (citations and internal quotation marks

omitted); *see also Linville v. State*, 137 Wn. App. 201, 208, ¶ 16, 151 P.3d 201 (2007) ("If a plaintiff cannot establish that the defendant owes a duty of care, [the court] need not determine the remaining elements of a negligence claim."). Conversely, it is the defendant who must plead and prove that immunity bars liability, but only after the plaintiff proves all four elements of negligence. *E.g.*, *Entila v. Cook*, 187 Wn.2d 480, 485, 389 P.3d 1099 (2017) (industrial insurance act immunity); *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014) (recreational immunity). Consequently, the question presented for the Court is not whether Tacoma or Officer Volk are *immune* from negligence (as Beltran-Serrano suggests), but rather whether an actionable *duty of care exists* in the first instance. Blurring the inquiries upends the analysis rather than aiding it.

This misconception dovetails into Beltran-Serrano's criticism of case law consistently rejecting the existence of an actionable duty to reasonably investigate allegations of criminal behavior. Br. of Appellants at 17-18. On this point, Washington law is well settled that "claim[s] for negligent investigation … do not exist under the common law in Washington." *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702, 222 P.3d 785 (2009) (citing *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999)); *see also Janaszak v. State*, 173 Wn. App. 703, 725,

297 P.3d 723 (2013) ("We have refused to recognize a cognizable claim for negligent investigation against law enforcement officials and other investigators."); *Fondren v. Klickitat County*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) (same); *Keates*, 73 Wn. App. at 267 ("As a general rule, law enforcement activities are not reachable in negligence."); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992) (same); *Dever v. Fowler*, 63 Wn. App. 35, 45, 816 P.2d 1237 (1991) (same). The rationale behind this established view is to aver "the chilling effect such claims would have on investigations." *Pettis*, 98 Wn. App. at 558. Of course, police are not "immune" from liability for their actions as Beltran-Serrano infers. When police wrongfully and maliciously withhold evidence, concoct false evidence, or seek to punish the innocent without probable cause, liability most assuredly exists under Washington's common law. *Bender v. City of Seattle*, 99 Wn.2d 582, 591-95, 664 P.2d 492 (1983). The same is true for claims of excessive force resulting in an individual's death or serious injury.[1]

[1] Battery is defined as "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000) (citation and internal quotation marks omitted). "An assault is any act of such a nature that causes apprehension of a battery." *Id.* A defendant sued for assault or battery may claim that the actions were reasonably necessary, and under state law it is for the jury to assess that defense. *E.g.*, *Guijosa v. Wal-Mart Stores*, 101 Wn. App. 777, 793-94, 6 P.3d 583 (2000); *see also* RESTATEMENT (SECOND) OF TORTS § 65 (1965). If Beltran-Serrano's evidence as to the unreasonableness of Officer Volk's reaction and her lack of credibility is as persuasive as claimed, *see* Br. of

Additionally, the legislature[2] as "the body [entrusted] to make the policy decisions" for the State of Washington, *Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980), has enacted statutes establishing implied duties of care not otherwise available under the common law. More specifically, this Court recognized an implied duty to reasonably investigate allegations of child abuse under RCW 26.44.050. *Ducote*, 167 Wn.2d at 702-03; *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003); *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The Court of Appeals has extended this duty to law enforcement. *McCarthy v. Clark County*, 193 Wn. App. 314, 328, 376 P.3d 1127, *review denied*, 186 Wn.2d 1018

Appellants at 4-9, he should easily prevail on that cause of action (which is still pending) and recover all damages proximately caused therefrom.

[2] Beltran-Serrano points to a Seattle Times "analysis" that found 213 people to have been killed by law enforcement in Washington between 2005 and 2014. Br. of Appellants at 15 n.9. Seemingly, Beltran-Serrano suggests that the Court should infer that a certain percentage of these shootings were wrongful or unjustified, and as a result, negligence law must be expanded to deter such shootings. Neither the news article nor Beltran-Serrano's brief offers anything to suggest what percentage (if any) of the persons killed by law enforcement were unlawful or tortious. What is certain is that nationally, 231 law enforcement officers were feloniously killed between 2013 and 2017 alone, a figure that does not include those officers unlawfully assaulted and injured. FBI, *Law Enforcement Officers Killed & Assaulted*, Table 1, *available at* https://ucr.fbi.gov/leoka/2017/. Some of these officers lost their lives at the hands of someone who had not committed any crime beforehand. *Id.*, Table 24 (noting 16 officers killed between 2013-2017 in unprovoked attacks). WSAMA identifies these statistics not to minimize the need to hold the police accountable when they wrongfully injure the innocent. Rather, it is to point out that police officers face a certain degree of risk when discharging their duties, and the need to balance that risk against liability is a policy decision. Such policy decisions should be left to the governmental body vested with the responsibility to develop policy, namely the legislature.

(2016). This Court has done so in other circumstances—recognizing an actionable duty implied by statute where it otherwise did not exist under the common law. *E.g.*, *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 546, 374 P.3d 121 (2016) (mandatory reporters have actionable duty to report elder abuse); *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 77-78, 247 P.3d 421 (2011) (mandatory reporters have actionable duty to report child abuse); *Tyner*, 141 Wn.2d at 82 (duty to investigate child abuse).

To this end, Washington courts have recognized an actionable duty of care in negligence owed by law enforcement only in circumstances involving a statutory duty to take action, *e.g.*, *Washburn v. City of Federal Way*, 178 Wn.2d 732, 754-57, 310 P.3d 1275 (2013) (recognizing "legislative intent" in chapter 10.14 RCW to impose liability on "City's discharge of this duty to act, service of the [anti-harassment] order" if such discharge "constituted 'culpable neglect'"), or when a special relationship exists between the plaintiff and law enforcement, *e.g.*, *Torres v. City of Anacortes*, 97 Wn. App. 64, 77-78, 981 P.2d 891 (1999) (officer's assurance to domestic violence victim that report would be referred for charging created special relationship with plaintiff). Conversely, when examined solely under the lens of the common law, Washington courts

have consistently refused to recognize actionable duties of care owed by law enforcement absent any special relationship. *See supra*.

Adopting Beltran-Serrano's proposed cause of action would blur, erode, and ultimately eliminate this well established precedent. No party has pointed to any statute passed by Washington's legislature imposing a duty on law enforcement to do anything that Officer Volk allegedly failed to do, and there most certainly is nothing alleged that would suggest a special relationship developed between Volk and Beltran-Serrano. *Cf. Munich v. Skagit Emergency Communications Ctr.*, 175 Wn.2d 871, 879, 288 P.3d 328 (2012). In this vein, police would be held to a higher standard when contacting individuals in the field, even though doing so quite often requires "split-second judgments in tense, uncertain, and rapidly evolving circumstances." *Staats v. Brown*, 139 Wn.2d 757, 774, 991 P.2d 615 (2000) (citing and following *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

The same is not the case for investigations. Police detectives often take weeks, months, and sometimes years to probe through evidence and witnesses before developing (or not developing) probable cause to arrest. And if those investigations are performed negligently, it can profoundly damage a person's life, liberty, and property. Despite this, Washington courts still refrain from injecting negligence law into the investigative

realm, properly recognizing that the common law actions of malicious prosecution, false arrest, and false imprisonment provide for a remedy in addition to what federal law already guarantees. *Accord Manuel v. City of Joliet*, 580 U.S. ____, 137 S. Ct. 911, 920, 197 L. Ed. 2d 312 (2017) (recognizing ability to sue under 42 U.S.C. § 1983 for fabricating evidence in violation of Fourth Amendment); *Bender*, 99 Wn.2d at 591-95.

Yet Beltran-Serrano would have this Court—without any legislatively imposed mandate—adopt an actionable duty of care in tense circumstances lasting seconds, but still reject such duty in the latter scenario that allows for reflection, contemplation, and deliberation.[3] Inevitably, accepting Beltran-Serrano's invitation would create an irreconcilable conflict in Washington tort law when examining the conduct of law enforcement, which undermines the judiciary's goal of stabilizing the law. Both Washington tort law and federal law already provide individuals like Beltran-Serrano a remedy, assuming a jury believes his evidence and arguments. The Court need not and should not expand tort law without any legislative guidance.

[3] Absent convincing proof this precedent was both incorrectly decided and also harmful, stare decisis would mandate adherence. *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727-28, 381 P.3d 32 (2016).

B. This Court has previously rejected efforts like the one here, namely expanding negligence law in an effort to avoid defenses unique to intentional torts.

Let there be no mistake: Beltran-Serrano seeks to expand negligence law because, in his view, suing under other theories is apparently too onerous:

> While it is true that such a victim may in certain narrow circumstances recover under federal law in a 42 U.S.C. § 1983 claim, under state law for assault and battery, or under particular negligence theories such as negligent infliction of emotional distress, those claims are often narrowly confined or are foreclosed by broad immunity defenses.

Br. of Appellants at 16. In essence, Beltran-Serrano seeks an easier path to recovery than what he believes the law allows.

This Court has previously refused such efforts to expand tort law in an attempt to circumvent a viable defense. *See Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986); *Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943). In *Eastwood* the plaintiffs sued three different television stations, claiming a report they made was "false, untrue, and totally incorrect." *Id.* at 467-68. Filing their complaint just shy of three years after the alleged wrongful conduct, the plaintiffs alleged an "invasion of privacy" cause of action to avoid the two-year statute of limitations to which defamation claims applied. *Id.* at 468. This Court upheld the trial court's dismissal, holding that "[w]here a given set of facts gives rise to a defamation cause of action, it cannot be recharacterized as a

false light invasion of privacy cause of action for statute of limitations purposes." *Id.*

Seely reached the same result. The Court there affirmed the dismissal of a complaint, reasoning the plaintiff could not "evade the statute of limitations by disguising her real cause of action in the form of her complaint." 16 Wn.2d at 615. Because the factual allegations in the complaint really gave rise to a claim for assault and battery, the plaintiff's attempt to recharacterize the claim as conspiracy failed. *Id.*

The Court of Appeals also followed both *Eastwood* and *Seely* to reject the very tactic employed by Beltran-Serrano here. *Boyles v. City of Kennewick,* 62 Wn. App. 174, 177-78, 813 P.2d 178 (1991). In *Boyles* the plaintiff sued a Kennewick police officer and the City claiming the officer injured her by using excessive force when he arrested her. *Id.* at 175-76. The plaintiff filed suit nearly three years after the arrest. *Id.* at 176. After the defendants moved for dismissal under CR 12(b)(6) arguing the complaint was untimely, the plaintiff sought leave to amend her complaint to "'add an additional cause of action alleging negligence.'" *Id.* The trial court granted dismissal and denied the plaintiff leave to amend. *Id.* The Court of Appeals affirmed, basing its holding on the rule that "a police officer making an arrest . . . becomes a tortfeasor and is liable as such *for assault and battery* if *unnecessary violence or excessive force is used in*

accomplishing the arrest." *Id.* (first italics in original, second emphasis added). The court held that the plaintiff's allegation that the officer's "arrest was improper and excessive" did not give rise to a negligence cause of action, but rather one of assault and battery. *Id.* at 177. Because the complaint was filed more than two-years after the arrest, the dismissal was upheld.

Though *Eastwood*, *Seely*, and *Boyles* each involved the statute of limitations defense, there is nothing in those opinions that suggests the rationale therein is limited to whether a lawsuit is timely; rather, the reasoning employed by those courts invariably rejects the view that a plaintiff can recharacterize a tort to avoid an applicable defense. Yet apparently that is exactly what Beltran-Serrano seeks to do, as he ostensibly believes suing under 42 U.S.C. § 1983 and/or assault or battery[4] prove too great of a hurdle to obtain recovery. The Court should reject this tactic.

[4] As stated above, it is unclear why Beltran-Serrano believes suing for assault and battery would be too difficult, particularly when those causes of action are still pending.

C. Nearly every other jurisdiction to consider the issue, including one cited by Beltran-Serrano, has rejected the application of negligence principles in the context of intentional acts.

Like Washington, other jurisdictions have consistently rejected efforts to disguise tort claims by artfully pleading around a defense. *See, e.g.*, *Latits v. Phillips*, 826 N.W.2d 190, 197 (Mich. Ct. App. 2012) ("Plaintiff's claim is one of an intentional tort, and no amount of artful pleading can change that fact."). Indeed, nearly every court to consider the issue has held that a plaintiff may not base a negligence claim on a police officer's intentional use of force. *See id.*; *see also Sylvester v. City of New York*, 385 F. Supp. 2d 431, 439 (S.D. N.Y. 2005) (holding that, under New York state law, an intentional shooting by a police officer cannot support a negligence claim); *Britton v. City of Crawford*, 803 N.W.2d 508, 517 (Neb. 2011) ("No semantic recasting of events can alter the fact that the shooting was the immediate cause of Jesse's death and, consequently, the basis of Britton's claim. Even if it is possible that negligence was a contributing factor . . . the alleged negligence was inextricably linked to a battery."); *Harrison v. City of Charleston*, No. 11-0598, *available at* 2011 WL 8193583 *and* 2011 W. Va. LEXIS 557 (W. Va. Nov. 28, 2011), at **4-6 (holding that a police officer's intentional use of force cannot give rise to negligence); *City of Waco v. Williams*, 209 S.W.3d 216, 222 (Tex. Ct. App. 2006) ("'A plaintiff cannot circumvent the intentional tort

exemption by couching his claims in terms of negligence.'") (quoting *Harris County v. Cabazos*, 117 S.W.3d 105, 111 (Tex. Ct. App. 2005)).

Beltran-Serrano asks this Court to look to other states to support his argument, one of which is the Arizona Court of Appeals decision *McDonald v. Napier*, 406 P.3d 330 (Ariz. Ct. App. 2017), which held an officer's intentional use of force can still form the basis of a negligence claim. *See* Br. of Appellants at 27. That reliance is no longer sound, as the Arizona Supreme Court overturned *McDonald* just over a month ago. *Ryan v. Napier*, No. CV-17-0325-PR, *available at* 2018 WL 4016372 & 2018 Ariz. LEXIS 248 (Ariz. Aug. 23, 2018). The court dismissed the same argument advanced by Beltran-Serrano primarily because "negligence and intent are mutually exclusive grounds for liability." *Ryan*, 2018 WL 4016372 at *4. But the court also recognized that allowing negligence to attach to an police officer's intentional use of force would "permit plaintiffs to 'plead around' statutory provisions that only apply to intentional tort claims," concluding that "the applicability of legislatively mandated immunity, insurance, and evidentiary presumption provisions should not depend on clever pleading." *Id*. at *5.

This does not mean, as Beltran-Serrano suggests, that police officers are immune from negligence. On the contrary, these courts acknowledge that under some circumstances damages resulting from a

police officer's *unintentional* conduct may lead to negligence liability. *Ryan*, 2018 WL 4016372 at *6; *Latits*, 826 N.W.2d at 196–97; *see also Dist. of Columbia v. Chinn*, 839 A.2d 701, 712 (D.C. Ct. App. 2003). But these courts have universally rejected negligence claims when it is undisputed that a police officer *intended* to use force. *See, e.g.*, *Latits*, 826 N.W.2d at 196 ("Negligence might have been the proper claim if defendant had unintentionally pulled the trigger or if defendant had been aiming at a different target but accidentally shot Latits instead. But there was nothing negligent or reckless about defendant's decision to point his firearm at Latits and shoot—he did so intentionally."). This is true even when it is questionable whether the officer's decision to use force was correct. *Id*. ("[T]he claim that defendant failed to appreciate that Latits did not pose a risk of harm may have some bearing on whether defendant made the proper decision to shoot, but it does not alter the fact that was an intentional decision to shoot."); *see also Ryan*, 2018 WL 4016372 at *4 ("Klein's internal evaluation of whether to [use force] and his decision to do so was part and parcel of his intent to inflict harmful or offensive contact on McDonald.").

The national consensus on this issue reveals that Beltran-Serrano's argument is contrary to fundamental tort principles. Further, Washington

courts have mirrored this consensus by consistently rejecting attempts to mischaracterize tort claims. This case should be no different.

V. CONCLUSION

For all of the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 25th day of September, 2018.

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